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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973.

No. 73-700

DOMINIC BIONDO and WILLIE FRANCISCO ORLANDO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. .....

DOMINIC BIONDO and WILLIE FRANCISCO ORLANDO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

Dominic Biondo and Willie Francisco Orlando, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on August 21, 1973.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals on August 21, 1973, in an opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto.

On September 27, 1973, the Court of Appeals overruled petitioners' joint petition for rehearing en banc or, in the alternative, for a rehearing. (See Appendix D.) No opinion was written, and the order has not been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 21, 1973. (See Appendix B and C.) A timely petition for rehearing en banc or, in the alternative, for a rehearing was denied on September 27, 1973. (See Appendix D.)

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I

Whether the Hobbs Act (18 U.S.C., Section 1951) applies to the fruit stand involved in this case, without evidence that the victim was an owner of the fruit stand or was fearful of its economic well being or that the fruit stand was engaged in interstate commerce, including the question of what evidence is necessary to prove an effect upon commerce—thus presenting in this case the question of whether the Court erred in submitting the cause to the jury because the prosecution failed to make a submissible case against petitioners.

II

Whether there was a fatal variance between the indictment under the Hobbs Act relating to one fruit stand and the evidence relating to three fruit stands.

III

Whether the Courts below erred in the application of the Jencks Act (18 U.S.C., Section 3500) to the facts of this case, including:

A. Whether the prosecution may deliberately fail to record and produce grand jury testimony of an FBI agent who testifies before the grand jury while the testimony of other witnesses has in fact been recorded.

B. Whether a witness may be permitted to testify whose grand jury testimony has not been recorded because of the failure of the prosecution to make reasonable efforts to locate the court reporter and to preserve the transcript.

C. Whether the prosecution must produce statements of a co-employee of a witness who testifies, the co-employee having been interviewed as to the same company business records about which the witness testified.

IV

Whether the prosecution may jointly indict a material witness, sever him from trial on the eve of trial, and dismiss all charges against him after the conclusion of the trial, thereby immunizing said witness from being called as a defense witness.

V

Whether the Court may receive evidence of statements made to an FBI agent by an arrested defendant after having advised the agent that he did not want to make any statements.

VI

Whether the rights of petitioners were violated by the prosecutor's comment in closing argument on the failure of petitioners to testify.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Article I, Section 8. The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . .

Fifth Amendment.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Statutes of the United States

Title 18, United States Code

Section 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Section 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the

subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * * * *

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT

Petitioners, Dominic Biondo and Willie Francisco Orlando, were convicted on the second count of a two-count indictment alleging violations of Title 18, United States Code, Section 1951 (the Hobbs Act). Petitioners were tried jointly (along with another defendant, Joseph Anthony Scalise, who was acquitted). Petitioners' appeals in the Court of Appeals for the Eighth Circuit were consolidated; they filed a joint brief and the Court of Appeals issued a single opinion disposing of their appeals.

The original indictment was in two counts. The first count charged Biondo, Orlando and Scalise with interfering with interstate commerce by extortion. Count II charged Biondo, Orlando, Scalise and Anthony Michael Accardi with conspiracy to interfere with interstate commerce by extortion. Pre-trial motions for severance filed by each defendant were denied, but a few days prior to the date set for trial, Accardi was severed, and the three remaining defendants were tried jointly on both counts. At the close of the government's case, the Court sustained defense motions for judgment of acquittal as to Count I but overruled the motions as to Count II (Tr. 575).[1] The jury convicted Biondo and Orlando and acquitted Scalise (Tr. 687-688).

The Count on which petitioners were convicted alleged that Joseph Wozniak was a part owner of Colonial Markets No. 1 and No. 2 in the Eastern District of Missouri and that a substantial portion of the fruit and produce sold by the markets was shipped in interstate commerce; that from March 1, 1971, to May 21, 1971, the four defendants conspired to obstruct,

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[1] "Tr." references are to the typewritten transcript of proceedings in the District Court (three volumes). By order dated April 6, 1973, the Court of Appeals dispensed with the preparation of an Appendix.

delay, and affect commerce by extortion through threats to the health and physical well being of Wozniak's family and the economic well being of Colonial Market No. 2. It was further alleged that it was part of the conspiracy to place Wozniak in fear for the safety of his family by threats and for his economic well being by threatening that Biondo and Accardi would run up bills on Colonial Market No. 2 in the amount of $100,000.00, for which he would be responsible; that Biondo and Orlando demanded $15,000.00 from him and were paid $5,000.00 on May 21, 1971.

The jury was empaneled on November 2, 1972 (Tr. 10). Testimony began on November 6, 1972 (Tr. 12), and the trial lasted for five days. A verdict was returned late in the evening on November 10, 1972 (Tr. 687-688).

The only evidence came from witnesses and exhibits produced by the prosecution. No defendant offered any evidence, although the defendants wanted to call Accardi, who had been severed from the trial, but his attorney refused to permit him to testify because of the pendency of the charges against him (Deft. Exh. F; Tr. 544-555). The evidence in behalf of the prosecution tended to show the following:

In the early summer of 1970 Joseph Wozniak, a retired merchant about 70 years old, met Anthony Accardi who operated a fruit and vegetable huckster's wagon (Tr. 27-28). Accardi was interested in purchasing a garbage disposal business and Wozniak loaned him $20,000.00 (Tr. 30). The money came from an accumulation of cash over twenty years which he kept in his basement (Tr. 190-191). Accardi did not purchase the garbage business but in September, 1970, he invested it in a produce market at 1140 Florissant Road, Cool Valley, St. Louis County, Missouri—Colonial Market No. 1 (Tr. 30-31). Wozniak and Accardi had no written agreement concerning this transaction (Tr. 30).

In November, 1970, Accardi, with the financial assistance of Wozniak, purchased another fruit stand on Woodson Road in University City, St. Louis County, Missouri. Wozniak advanced the purchase price of $2,000.00 and three months rent (Tr. 44-46). On December 30, 1970, Accardi purchased Colonial Market No. 2 on Highway 140 at Florissant Road, Florissant, St. Louis County, Missouri (Tr. 40-43). Wozniak issued a check to the former owner of Colonial No. 2 for $6,000.00 as the purchase price of the fixtures and business (Tr. 50-51, 304). The lease for the premises was signed on January 12, 1971, by Accardi, Wozniak and a third person, and Wozniak paid $1,450.00 for rent (Govt. Exh. 3, Tr. 43-44, 47-49, 288, 298). Later Accardi deposited A. T. & T. stock as security on the lease (Tr. 189-190, 294). Rent payments were made by Accardi (Tr. 293), and Wozniak and the former owner of the business were guarantors on the lease (Tr. 295-296).

Wozniak first met Orlando when he worked at Colonial No. 1 in the fall of 1970 (Tr. 54). He liked Orlando and from time to time they discussed Wozniak's problems with Accardi (Tr. 237-239, 260). Wozniak met Scalise earlier, and in late 1970 Scalise worked for Colonial No. 1 until the spring of 1971 (Tr. 62-63, 266). From February to May, 1971, Wozniak saw Biondo (who was known as "Beaver") at Colonial No. 1 but spoke to him only once. (Tr. 63-64).

In April, 1971, Wozniak loaned $3,500.00 to Orlando and Scalise for a business venture; they were supposed to repay the unsecured loan without interest at the rate of $100.00 per week (Tr. 249-250). On May 18, 1971, Wozniak received a phone call from Orlando to meet Orlando and Scalise at a shopping center. They went to a drug store and had coffee. Orlando and Scalise explained that they were unable to make payments at that time on their loan because Orlando's wife had just had a baby and Scalise's child was hospitalized (Tr. 65-68, 251-253, 269).

According to Wozniak, Orlando then told him that Biondo wanted $15,000.00 or else Biondo would hurt Wozniak's wife and daughter and, together with Accardi, would run up bills for purchases of merchandise at Colonial Market No. 2 to the extent of $100,000.00. Wozniak would be responsible for these bills because he was on the lease (Tr. 68-70). Orlando and Scalise both characterized Biondo as a mean person (Tr. 71). The $15,000.00 was to get Biondo on Wozniak's side and no further money would have to be paid (Tr. 72). Orlando suggested that Wozniak meet Biondo that afternoon (Tr. 73). Wozniak never saw Scalise after this meeting until the trial (Tr. 271).

On May 19, Orlando called Wozniak and said that Biondo was upset because Wozniak had not met him. Wozniak agreed to meet him that night (Tr. 74-75). He also received a call in Wentzville, Missouri, from a person whom he identified as Biondo who asked why he had not met the night before; he demanded $15,000.00 that night. Threats were made against his wife and child and also to run up $100,000.00 in bills on Colonial No. 2. When Wozniak protested that he could not get the money that night, the caller demanded that he be on the parking lot that night with the money (Tr. 90-91). When Wozniak went to the parking lot that night, no one was there (Tr. 91-92).

The next day, May 20, Wozniak received a call from Orlando as to why he had not been there the night before. When Wozniak said he was on the shopping center lot, Orlando said that he and Biondo had been on the lot of Colonial No. 1, and Biondo was mad. Orlando told Wozniak that Biondo had an argument that night with Scalise and had seriously injured Scalise but would not allow anyone to take him to a doctor. Orlando repeated that Wozniak should meet Biondo (Tr. 93-94). Shortly afterward, he received a call from Biondo who again threatened his wife and child. He told Wozniak to be on the shopping center lot that night with the money (Tr. 95-96).

That evening Wozniak went to the shopping center lot. Biondo and Orlando drove up and they talked in Biondo's car. When Wozniak said he did not have $15,000.00, Biondo again threatened his wife and child. When Orlando told Biondo not to hurt the child, Biondo threatened to hurt Orlando the same as Scalise. Then Biondo threatened to run up bills of $200,000.00 on Colonial No. 2. (In his grand jury testimony a week later, Wozniak said nothing about the subject of running up bills.) Biondo gave Wozniak a deadline of noon the following day to get the money (Tr. 96-98, 228). After Biondo drove off, Orlando told Wozniak how Biondo had hit Scalise over the head with an iron pipe (Tr. 98-99). This meeting was observed by F.B.I. Agent Jones, but he overheard nothing (Tr. 454-455).

On May 21, Wozniak called the market for Biondo but did not talk to him (Tr. 99-100). He received two calls from Orlando which were monitored and recorded by F.B.I. agents with the permission of Wozniak (Govt. Exh. 7, Tr. 102-103, 452-453, 518, 531-540). In the conversations, Wozniak said he could raise $5,000.00, and Orlando told him to bring the money to the parking lot at 3:30 (Tr. 110-112). There was no mention of the subject of bills of the market in these recorded conversations (Tr. 531-540). About noontime on May 21, Biondo and Orlando were observed by an F.B.I. agent at the shopping center lot and, shortly after that, at Colonial No. 1, but none of their conversations were overheard (Tr. 417-418, 431-433, 456).

After his phone conversations, Wozniak then drove to a bank in Wentzville, Missouri. He withdrew $5,000.00 from his account which he placed in a white bank envelope initialed by one of the two F.B.I. agents who was present (Tr. 112-113, 418-420). He drove back home and then went to the shopping center where he met Biondo and Orlando (Tr. 114-115). The meeting was under surveillance of F.B.I. Agents Jones, Dunay and others (Tr. 421-424, 435-437, 456-458). At Biondo's

direction Wozniak sat in the car with Orlando seated next to him, and Wozniak handed the envelope containing $5,000.00 to Biondo who was standing outside the Wozniak car. Biondo told him to give the balance of $10,000.00 to Orlando in a week (Tr. 115-116, 423). Biondo made no threatening gestures (Tr. 435). Biondo then walked to his own vehicle carrying the envelope. After he got into his automobile and started to leave the shopping center lot, he was arrested by two agents of the F.B.I. (Tr. 421-424, 436-437). The white envelope was seized from the front seat and contained the same $5,000.00 which Wozniak had withdrawn from the bank (Tr. 426-427).

In the meantime, Orlando was also placed under arrest while still in the Wozniak car (Tr. 116, 456-458). At the F.B.I. office after the arrest, Orlando was advised of his Miranda rights and refused to sign a waiver of his rights form. Agent Jones continued to question him, and he denied any knowledge of extortion or the $5,000.00, and denied that he had been on the shopping center lot earlier when he had been observed by Jones (Tr. 491-492, 510-512).

During all of the conversations from May 18 to May 21, Orlando never threatened Wozniak, his wife, his child, or his business (Tr. 262).

Wozniak had first complained to the F.B.I. on May 18, and he was in constant consultation with them after that. He had permitted them to record the phone calls of May 21, and they had placed a recording device on him when he transferred the $5,000.00 to Biondo on May 21. The device did not work (Tr. 156-167, 502-507, 543-544). His first interview with the F.B.I. had been on May 12 on an unrelated matter (Tr. 497-498). At that time Wozniak was calm and relaxed. On May 18 and thereafter, the agent found Wozniak to be nervous and upset (Tr. 444-454).

The indictment alleged that Wozniak was a part owner of Colonial Market No. 2. In an effort to sustain this allegation

and to show his interest in the fruit stand and presumably to show the effect on interstate commerce, there was evidence that Wozniak was authorized to and did sign checks on a checking account together with Accardi for Colonial No. 1 (Govt. Exh. 1, Tr. 34-36, 53). He testified that he conferred with Accardi, made decisions as to operations of Colonial No. 1 and visited almost daily (Tr. 31). Accardi managed the day to day operations of Colonial No. 2 (Tr. 53), had the authority to hire and fire and ordered the produce (Tr. 235). Accardi paid the rent (Tr. 293). From time to time there had apparently been disputes between Accardi and Wozniak, and on two occasions Wozniak unsuccessfully tried to remove Accardi and put Orlando in charge of Colonial No. 1, so that it could earn enough money to return his loan (Tr. 60-61, 239-243). Wozniak acknowledged that in effect he was calling in his loan (Tr. 243-244).

There was an issue in the testimony as to whether Wozniak was responsible for debts of the fruit stands. The government had alleged in the indictment that Wozniak was a part owner, but there were no documents to substantiate any such ownership. The only signed document was the lease on Colonial No. 2 which he considered as a partnership agreement (Govt. Exh. 3) but he acknowledged that this only obligated him for rent, and he could not recall any other written document which created any obligation for him (Tr. 184-185). Only Accardi signed the bill of sale when he purchased Colonial No. 2; Wozniak did not sign it (Govt. Exh. 2; Tr. 306-307). Wozniak testified that the original $20,000.00 for Colonial No. 1 and the money he gave for Colonial No. 2 were loans to Accardi (Tr. 183, 189-190). The original plan was for Accardi to repay Wozniak for all money advanced by Wozniak (Tr. 188). On cross-examination, he acknowledged that he had told Agent Jones that he did not think Accardi or Biondo could run up bills on Colonial No. 2 to hold him responsible (Tr. 211-218). When questioned by the Court, he stated "I would say I did not think they could run up the bills"

(Tr. 218). The subject of running up bills at the markets was not mentioned in the recorded conversations with Orlando (Tr. 219, 259-260, 531-540)

Wozniak said that he had paid some of the bills of the businesses and from time to time he did advance money to Accardi, but he stated that the money which he advanced was in the nature of loans. On February 15, 1971, he gave a check to Accardi for $9,363.00 to pay unpaid bills of Colonial No. 1, and this was a loan (Govt. Exh. 6, Tr. 54-57, 188, 215). He never accepted any responsibility or told any supplier that he would be responsible for Colonial No. 2 bills except for the rent (Tr. 187-188). He never received any money from the sale of fruit and produce (Tr. 207).

The prosecution attempted to show federal jurisdiction for the extortion charge by virtue of its alleged effect upon interstate commerce. There was evidence from three suppliers that some of the items sold at the fruit stands originated out of state.

Korando, a milk distributor for an Illinois dairy (Tr. 309), made several deliveries a week to both Colonial Markets (Tr. 310-312). Each delivery was about 100 gallons of milk (Tr. 313-314). At first Accardi paid him by check, but the checks bounced and by May, 1971, the dairy refused to extend any further credit. As a result, Korando purchased the milk in Illinois and made deliveries from his own truck and business located in St. Louis (Tr. 314-316, 319-320). The money was owed to Korando and not to the dairy (Tr. 315). He had never seen or dealt with Wozniak (Tr. 316).

Mrs. Mercurio, bookkeeper for her husband's wholesale fruit and produce company (Tr. 332), identified delivery tickets for fruit and produce delivered to Accardi during the months of March, April and May, 1971 (Govt. Exhs. 11, 12 and 13; Tr. 336, 344-346). She was asked about certain specific fruits

and vegetables appearing on some of the delivery tickets and stated that they came from out of state (Tr. 346-368), although her information was based upon hearsay (Tr. 348-350). She was not acquainted with Wozniak and was never referred to him for collection (Tr. 372, 384).

Braun sold eggs to Colonial No. 2 (Tr. 388-389). Of the eggs which he sold, 75% came from Illinois and 25% from Missouri (Tr. 387, 389), but he could not tell by looking at an egg where it came from (Tr. 396). He delivered thirty to sixty dozen eggs a week (Tr. 390), at a price of twenty-five to forty cents per dozen (Tr. 401). He dealt with an employee of the market (Tr. 389), and Wozniak never ordered eggs (Tr. 400).

There was no evidence as to the total volume of sales or purchases by any or all of the fruit stands or any percentage relationship between the purchases in evidence and total purchases. The only reference to percentages came in a discussion out of the presence of the jury that shrubs and trees represented a very minor percentage of the business (Tr. 343). There was no indication as to the percentages for milk, eggs, fruit or vegetables.

At the close of the government's case, defendants' motions for judgment of acquittal were sustained as to Count I but overruled as to Count II (the conspiracy count) (Tr. 575). The defendants offered no evidence, but they did desire to call Anthony Accardi as a witness. Because he was a defendant charged but not tried, his attorney refused to permit him to testify (Deft. Exh. F; Tr. 554-555).

The cause was submitted to the jury on the conspiracy charge. The jury returned a verdict finding defendants Biondo and Orlando guilty and defendant Scalise not guilty (Tr. 687-688). On December 8, 1972, petitioners' renewed motions for judgment of acquittal or for a new trial were presented and

overruled (Tr. 703). The Court sentenced each defendant to a term of imprisonment for five years, Orlando's sentence to be served under 18 U.S.C., Section 4208(a)(2) (Tr. 710, 715).

Petitioners remained free on bonds of $50,000 (Tr. 710, 715). Each duly filed notice of appeal to the United States Court of Appeals for the Eighth Circuit on December 8, 1972.

The consolidated appeal was argued on June 14, 1973, in St. Paul, Minnesota. On August 21, 1973, the panel of the Court of Appeals filed an opinion (Appendix A) affirming the convictions. Petitioners' timely petition for rehearing en banc or, in the alternative, for a rehearing was overruled on September 27, 1973. (See Appendix D.)

This joint petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioners' convictions.

REASONS FOR GRANTING THE WRIT

I

Hobbs Act—Submissible Case

The Hobbs Act (18 U.S.C., Section 1951) provides that "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . ." shall be punished. In Count II on which petitioners were convicted, they were charged with conspiring to obstruct, delay, and affect commerce and the movement of fruit and produce in commerce by extortion—"that is to obtain the property of one JOSEPH WOZNIAK with his consent by the unlawful use of fear generated by threats made to the health and physical well being of his family and the economic well being of the Colonial Fruit Market No. 2, of which WOZNIAK was a part owner."

The general question presented herein is whether the Hobbs Act ought to be extended to a fruit stand with slight evidence of interstate purchases and no evidence of an effect upon interstate commerce other than such purchases. A related question is whether the extortionate activity had any relationship to the fruit stand.

Even assuming threats were made to harm Wozniak's family, it was incumbent upon the prosecution to show a conspiracy to affect interstate commerce. Otherwise there would be, at most, a state offense (Missouri's extortion statute is Section 560.130, V.A.M.S.), but there could be no federal prosecution consistent with the due process requirement of the Fifth Amendment and the separation mandate of the Tenth Amendment. Before an extortion could become a federal offense, there must be some effect upon commerce. The effect, of course, could

be from a business involved in commerce or from using the facilities of commerce or from some other traditional area within the Commerce Clause of the Constitution, Article I, Section 8.

To prove an effect on interstate commerce, the prosecution alleged and attempted to show (a) that Wozniak was a part owner in Colonial Market No. 2, (b) that he was fearful of its economic well being, and (c) that the fruit stand was engaged in interstate commerce. We believe that they failed to prove any of these elements, and that this Court should review the dangerous extensions by the Eighth Circuit of the Hobbs Act to the facts of this case.

A. On the issue of Wozniak's alleged part ownership of Colonial No. 2, the evidence was insufficient to show any such ownership—it proved only that he had loaned money to the owner Accardi. Not only was there no evidence that he had any ownership interest or responsibility for the obligations of the fruit stand (except as a guarantor on a lease), but his own testimony negated the prosecution's theory, for he stated that at the time he did not think that Biondo and Accardi could run up bills to hold him responsible (Tr. 211-218).

The Court of Appeals opinion suggests that it is not necessary to determine whether Wozniak had an ownership interest, but is vague as to his relationship. The prosecution alleged that he was a part owner. If he had some other interest so as to affect interstate commerce, then a serious variance question arises, for the evidence would then be different from the indictment. Cf. **Stirone v. United States,** 361 U.S. 212 (1960).

B. The prosecution also failed to prove that Wozniak was fearful of the economic well being of Colonial Market No. 2. The prosecution theorized that Biondo threatened to incur bills of $100,000.00 to $200,000.00 on Colonial Market No. 2 for which Wozniak would be responsible, and that Wozniak was

fearful in this regard. Their theory was directly contradicted by the testimony of their own witness Wozniak for whom they vouched, and he acknowledged at least five times that during the crucial period he did not think that they could run up such bills (Tr. 211-218). The prosecution may not now draw inferences contrary to the evidence which it has presented. See **Rodgers v. United States,** 402 F. 2d 830, 833-834 (9th Cir. 1968), and **Causey v. United States,** 352 F. 2d 203, 206-207 (5th Cir. 1965). Cf. **United States v. Di Re,** 332 U.S. 581, 594 (1948): "Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person."

Thus we have a situation in the instant case where all of the prosecution's evidence was that there was no fear of Wozniak within the realm of interstate commerce and that he was a lender of money and not a part owner of the business. There was absolutely no evidence to the contrary. Accordingly, the case should not have been submitted to the jury because, not only did Wozniak not have an ownership interest in the fruit stand, but he was not fearful that he would suffer economically as to it.

C. The most glaring omission in the prosecution's case, which when approved by the Court of Appeals results in an improper application and a dangerous extension of the Hobbs Act to an area not intended by that Act, was that there was no proof of an effect on interstate commerce; there was no evidence that the fruit stand was engaged in interstate commerce. As said in **Stirone v. United States,** 361 U.S. 212, 218 (1960): "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference."

As proof of interstate commerce, the prosecution had three witnesses: Korando, a St. Louis milk supplier, purchased his milk in Illinois and then sold it several times a week to Colonial

No. 1 and No. 2, each delivery being about 100 gallons (Tr. 309-314). Mrs. Mercurio testified that her husband's firm, for which she was the bookkeeper, sold certain fruits and vegetables which came from out of state (Tr. 345-368). Braun, an Illinois egg dealer, delivered Illinois and Missouri eggs to Colonial No. 2, total sales ranging from $7.50 to $24.00 per week (Tr. 387-390, 401).

Although the indictment alleged that "a substantial portion" of the fruit and produce of Colonial No. 1 and No. 2 was shipped in interstate commerce and although the Court of Appeals used the word "substantial" to characterize the amount of interstate purchases, there was no effort by the prosecution to relate the isolated sales mentioned by their three witnesses to total volume. In fact, the prosecutor attempted to withdraw from the language of the indictment on at least two occasions. In the argument on the motions for judgment of acquittal, he stated that the statute "doesn't set up quotas of substantial or overwhelming in regard to interstate commerce" (Tr. 567). And when defense counsel in final argument was calling the jury's attention to the allegation in the indictment, the prosecutor interrupted to state incorrectly: "We don't say a substantial portion" (Tr. 600).

We believe that the evidence lacked any probative force to show an effect on interstate commerce. Without some proof as to total volume of sales or purchases and the percentage relationship of the sales in evidence, it is not possible to conclude that interstate commerce could have been affected. There was no evidence that the milk, fruit, vegetables and eggs in evidence were more than a very minor percentage of the business, nor as to what other items were sold or services rendered by the business.

The question of what constitutes interstate commerce has troubled federal Courts; at times the standards will vary depend-

ing upon the particular federal statute involved. But regardless of what standard is applied here, the prosecution's proof failed to show any effect whatsoever upon commerce. It is true that there was evidence that certain merchandise delivered to the fruit stand may have come from interstate commerce, but there was no evidence as to whether this was 100% of the total business or a small fraction of 1%.

The burden rested upon the prosecution to bring such evidence in; they failed to do so. With all of the powers of investigation and compulsion of evidence available to the prosecution, they could easily have produced books and records or other evidence to show the nature of the business of the fruit stand.

If the evidence in this case is sufficient to sustain a conviction, then the Hobbs Act has no bounds in its application. A person who robs or extorts from a corner newsboy could find himself a defendant in a federal prosecution, for certainly the newsboy is selling a newspaper related to interstate commerce. The extensions to which the Hobbs Act could be broadened are staggering.

We have been unable to find any case in which a conviction has been sustained where the evidence has been so obscure as to its effect upon interstate commerce. In those cases where convictions have been sustained, the evidence is clear or admitted that the business was engaged in interstate commerce. It would serve no useful purpose to cite the numerous Hobbs Act cases, for no clear delineation has developed as to what constitutes an effect upon commerce. Suffice it to say that we have found no case, nor has the government cited any in its brief in the Eighth Circuit, nor did the Court of Appeals opinion cite any case, in which there was so little evidence of interstate activity. Compare **United States v. Critchley,** 353 F. 2d 358 (3rd Cir. 1955), in which a conviction was reversed for failure to establish an effect upon interstate commerce.

This Court had discussed the federal jurisdictional requirement of interstate commerce on a number of occasions. In **Heart of Atlanta Motel, Inc. v. United States,** 379 U.S. 241 (1964), and **Katzenbach v. McClung,** 379 U.S. 294 (1964), although a different statute was involved, the opinions reveal the facts in evidence showing interstate commerce. Thus, in the **Atlanta Motel** case, it was located near interstate highways and the evidence was that "approximately 75% of its registered guests are from out of State." The restaurant in **McClung** was near an interstate highway and his meat purchases alone, which came from interstate commerce, constituted 46% of his total purchases.

This Court has also discussed the Commerce Clause's application to other federal statutes. It has rejected extensions into local activities such as a betting establishment visited by out of state bettors, **Rewis v. United States,** 401 U.S. 808 (1971), and gun possession. **United States v. Bass,** 404 U.S. 336, 347-350 (1971). The reasons for the refusal to extend the Commerce Clause were clearly indicated in the **Bass** case. In concluding that the government had failed to show the requisite nexus with interstate commerce, this Court stated:

> "This result is dictated by two wise principles this Court has long followed.
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> "First, as we have recently reaffirmed, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' Rewis v. United States, 401 U.S. 808, 812 (1971). . . .
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> "There is a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.[2] This congressional policy is rooted in

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[2] Missouri denounces extortion in Section 560.130, V.A.M.S.

> the same concepts of American federalism which have provided the basis for judge-made doctrines. See, e.g., Younger v. Harris, 401 U.S. 37. As this Court emphasized only last Term in Rewis v. United States, supra, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in a judicial decision. In Rewis, we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, 'would alter sensitive federal-state relationships [and] could overextend limited federal police resources.' . . . Absent proof of some interstate commerce nexus in each case, § 1202(a)[3] dramatically intrudes upon traditional state criminal jurisdiction."

Finally, it should be noted that this Court recently declined to extend the Hobbs Act into a labor matter where the illegal conduct was readily punishable under state law. See **United States v. Enmons,** 410 U.S. 396 (1973). See also **United States v. Altobella,** 442 F. 2d 310 (7th Cir. 1971), in which there was an attempt to prosecute for an extortion under Section 1952 of Title 18, U.S.C. (the interstate travel act). The matter was clearly covered by state laws of Illinois, and the Seventh Circuit, in reversing a conviction, ruled that the fact that the victim drew a check on an out of state bank and had traveled from out of state did not provide a sufficient connection with interstate commerce.

The lack of definitive guidelines as to what constitutes an effect upon interstate commerce sufficient for the Hobbs Act has created much litigation. Such guidelines should be deter-

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[3] Section 1951 in the instant case.

mined by this Court. The paucity of evidence in this case is cause for alarm. The next step would be Hobbs Act coverage of any extortion, for it would not be difficult to theorize an effect upon interstate commerce. There is no outer limit to which federal jurisdiction could be extended. This was not the intention of our constitutional forefathers in adopting the Commerce Clause and the Tenth Amendment, nor was it the intention of the Hobbs Act.

Because of the conflict with decisions of this Court on other issues of interstate commerce, because of the lack of harmony among the circuits, because of the need for guidelines as to application of the Hobbs Act, and because of the dangerous intrusion of our federal government into extortions of a local nature, we respectfully suggest that certiorari should be granted as to this Question.

II

Hobbs Act—Variance

The indictment charged in Count II that the defendants conspired to "obstruct, delay, and affect commerce and the movement of goods or commodities in commerce, to-wit: fruit and produce, by means of extortion, that is to obtain the property of one JOSEPH WOZNIAK with his consent by the unlawful use of fear generated by threats made to the health and physical well being of his family and the economic well being of the Colonial Fruit Market No. 2, of which WOZNIAK was a part owner." As part of the conspiracy, the indictment alleged in paragraph 5 that Biondo and Accardi "would run up bills on the Colonial Market No. 2, to the extent of $100,000, leaving WOZNIAK financially liable."

The indictment therefore related to Wozniak's interest in Colonial No. 2. But when evidence was introduced, there was

no effort by the prosecution or the Court, despite defense objections, to limit the evidence to Colonial No. 2; instead there was evidence of Colonial No. 1 (Tr. 30-31, 404-408), the Woodson Market (Tr. 44-46), and Wozniak's interest in Cousin Charlie's in Wentzville, Missouri (Tr. 74, 122). When witnesses Korando, Mercurio and Braun testified to deliveries of milk, fruit, vegetables and eggs, they were permitted to include deliveries to Colonial No. 1 as well as Colonial No. 2. Often there was no indication as to whether merchandise was sold to one or the other, but merely that it was delivered to "Colonial" (Tr. 307-308, 309-314, 344, 393-394, 396-397).

The District Court also permitted the prosecution to introduce evidence concerning the purchase of Colonial No. 1 (Tr. 30-31), and a bank account of Colonial No. 1 on which Wozniak was authorized to sign checks (Govt. Exhs. 1 and 10; Tr. 34-36, 53, 276-284), and testimony as to the loan of $9,363.00 by Wozniak to Accardi to be used for payment of bills of Colonial No. 1 (Govt. Exh. 6, Tr. 54-59).

Despite repeated efforts by the defendants to limit the evidence to Colonial No. 2 as charged in the indictment, the Court admitted all of the other evidence. The District Court was particularly troubled over this issue (Tr. 46) and made a special personal effort to finally lead Wozniak to the testimony that all three stands were treated as one business (Tr. 58). Certainly a combined business was not charged in the indictment, for it specifically referred to Colonial Markets No. 1 and No. 2, but alleged an effect on interstate commerce only as to Colonial No. 2. As a matter of fact, Wozniak testified that he did not mention the Woodson Market to the prosecutors until within a week prior to trial (Tr. 208-209).

The error was compounded when the Court instructed the jury. As to the elements of the offense, the Court charged that "such threats, if carried out, would actually or potentially in

any way or degree obstruct, delay or affect commerce or the movement of any article or commodities" (Tr. 661). There was no effort to relate such effect on commerce to Colonial No. 2 as charged in the indictment. The Court also said that if the jury found that there was a conspiracy to extort money "and if you further find and believe the testimony of government witnesses with reference to the commerce involved in the business known as Colonial Markets, and if you further believe that Joseph Wozniak was a part owner of the business known as Colonial Markets, then as a matter of law such extortion as charged in Count II of the indictment would have potentially affected commerce" (Tr. 662). The jury was permitted to convict if they found an effect upon commerce by virtue of Colonial No. 1, even if they were unconvinced or found there was no effect on commerce by any activities with reference to Colonial No. 2. Certainly this was a broadening of the offense far beyond the language of the indictment.

The Court further charged that "it is not necessary for the government to show that the defendant intended to conspire to specifically obstruct, delay or affect interstate commerce. All that is necessary as to this issue is that the government's evidence prove that the defendants intended to conspire to commit an act proscribed by the statute, the natural consequence of which would be to obstruct, delay or affect commerce" (Tr. 664-665). Again, on the basis of the evidence submitted in this case, such a finding could have been made as to Colonial No. 1 or the Woodson Market or even Cousin Charlie's without a requirement of a specific finding as to Colonial No. 2.

The variance here is quite similar to that in **Stirone v. United States,** 361 U.S. 212 (1960), where a Hobbs Act conviction was reversed because of a fatal variance. The indictment there alleged that the extortion affected the movement of sand in interstate commerce which was used in a ready-mix concrete business. The trial Court permitted evidence as to an effect on

interstate commerce by interference with the shipment of steel, inasmuch as the concrete was ultimately to go into a steel-processing plant which was being erected. The Court charged that the effect on interstate commerce could be with reference to the sand as charged in the indictment or the steel as related in the evidence. This Court reversed for such error and in so doing stated in language which is particularly appropriate to the instant case when interpolated as we have taken the liberty of doing (361 U.S. at 217-219):

> "The Bain case (Ex parte Bain, 121 U.S. 1) which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. (Cases cited.) Yet the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States [interference with interstate commerce in connection with the operation of Colonial No. 1] nor does the Court of Appeals appear to have so read it. The grand jury which found this indictment was satisfied to charge that Stirone's [petitioners'] conduct interfered with interstate importation of sand [interfered with interstate commerce in connection with the operation of Colonial No. 2]. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's [petitioners'] conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete [interfere with interstate commerce in connection with the operation of Colonial No. 1]. And it cannot be said with certainty that with a new basis for conviction added, Stirone was [petitioners were] convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports [in-

terference with Colonial No. 1] here is neither trivial, useless, nor innocuous. (Cases cited.) While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

"Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the Bain case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel

> from a nonexistent steel mill [that commerce in reference to Colonial No. 1] had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. (Cases cited.)"

Because the ruling in **Stirone** is determinative of the variance issue in this case, we have quoted at length from the opinion. It was fatal error for the trial Court in the instant case to receive evidence of other markets not included in the indictment's allegation of a crime. It was fatal error to instruct on this expanded crime.

Stirone is indistinguishable. We respectfully suggest that an appropriate disposition of this Question could be summary per curiam reversal of the judgment of the Court of Appeals, on the authority of **Stirone v. United States,** 361 U.S. 212 (1960).

III

Jencks Act Violations

During the trial, several violations of the provisions of the Jencks Act (18 U.S.C., § 3500) occurred. Each was of sufficient magnitude to justify a grant of certiorari and to require a reversal of petitioners' convictions.

A

Special Agent Donald E. Jones of the Federal Bureau of Investigation, the case agent in charge of the investigation of this prosecution, had appeared and testified before the grand jury (Tr. 495). When defense counsel requested the production of his grand jury testimony after his direct examination, the

prosecutor announced that no such testimony was available because it had not been recorded. A defense motion to strike the testimony of the witness was denied (Tr. 495-497). The Court of Appeals affirmed, on the theory that there is no duty to record grand jury testimony, but recognized a conflict with the Second and Ninth Circuits.

Under the provisions of § 3500, a witness' statement must be delivered to counsel for the defendant after the completion of the witness' direct examination. By amendment to the Jencks Act in October 1970, the term "statement" was broadened to include "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

Many prosecution witnesses who testified at the trial of this case had appeared before the grand jury; their grand jury testimony was routinely delivered to defense counsel in accordance with the provisions of the Jencks Act. But there was no such delivery as to Agent Jones because of a failure on the part of the prosecution to record his testimony. We believe the failure to do so was a deliberate effort by the prosecution to circumvent and violate the spirit of the Jencks Act and to deprive defendants of essential discovery material.

Until 1970, grand jury testimony was produceable only upon a showing of particularized need. See **United States v. Procter and Gamble Company,** 356 U.S. 677 (1958), **Pittsburgh Plate Glass Company v. United States,** 360 U.S. 395 (1959), and **Dennis v. United States,** 384 U.S. 855 (1966). But since the 1970 amendment to Section 3500, no showing of particularized need is required. Production is automatic under the amended Jencks Act as soon as the witness has completed his direct examination.

Even before the 1970 amendment, the subject of grand jury testimony was troublesome, and some courts interpreting Rule 6 of the Federal Rules of Criminal Procedure, adopted a policy

requiring production without a showing of particularized need. See, for example, **United States v. Youngblood,** 379 F. 2d 365 (2nd Cir. 1967), and **United States v. Gramolini,** 301 F. Supp. 39 (D.C., R. I. 1969). See also dissent in **United States v. Cramer,** 447 F. 2d 210, 220-223 (2nd Cir. 1971), cert. den. 404 U.S. 1024 (1972). **Youngblood** recognizes the problem of failure to record grand jury testimony, for, after stating at footnote 4 that stenographic minutes are regularly taken, the Court observed that "this may not have always been the practice, and where it has not been we do not imply that a defendant is entitled as of right to minutes that do not exist." See also **United States v. White,** 417 F. 2d 89 (2nd Cir. 1969), cert. den. 397 U.S. 912 (1970).

In **United States v. Thoresen,** 428 F. 2d 654, 665-666 (9th Cir. 1970), the defendant prior to his indictment requested an order that the grand jury proceedings be recorded. The Ninth Circuit found merit in the defendant's position, but, in the absence of a clear indication of prejudice and with a warning as to future proceedings, the Court held that the drastic remedy of a dismissal of the indictment would be inappropriate. (Query as to what the Court would have done if there had been a request to strike testimony of a particular witness who was deliberately selected for non-recording.) The **Thoresen** case was recently reviewed in **United States v. King,** 478 F. 2d 494, 507-508 (9th Cir. 1973), where the Court warned that "the Government is courting disaster when it fails to record grand jury proceedings," and in **United States v. Price,** 474 F. 2d 1223, 1225-1226 (9th Cir. 1973), where the sentences were vacated and the cause remanded for further hearing because of the failure to record. Cf. **United States v. Cianchetti,** 315 F. 2d 584, 591-592 (2nd Cir. 1963). See also Wright, **Federal Practice and Procedure,** Section 103, page 161, and 8 Moore's, **Federal Practice,** paragraph 6.02 [2], pages 6-18.

The Court of Appeals suggests that there is no constitutional or statutory requirement that grand jury testimony be recorded.

We submit that the 1970 amendment to the Jencks Act requiring the production of grand jury testimony is sufficient statutory authority that it be recorded.

We believe it is improper for a prosecutor to pick and choose which witnesses he wants to have recorded before the grand jury, with the obvious purpose of depriving the defendant of his Jencks Act right to use grand jury testimony for impeachment purposes. Although we have not urged that the indictment be dismissed because of the failure to record the testimony, we feel that the sanction provided in § 3500(d), that is, a striking of the testimony of the witness, is not only an appropriate but a required remedy under these circumstances.

The deliberate failure of the prosecution to record and produce the grand jury testimony of a key government witness violated petitioners' rights under the Fifth and Sixth Amendments to the Constitution. Because of the importance of this issue in the administration of criminal justice, as well as the conflict with opinions of the Second and Ninth Circuits and other authorities, we respectfully suggest that certiorari should be granted as to this Question.

B

During the afternoon of the third day of testimony, the prosecution advised the Court for the first time that grand jury testimony of its prospective witness Ann Mercurio was not available because they could not locate the court reporter who had been present during the grand jury proceedings (Tr. 324-325). Mrs. Mercurio had testified before the grand jury on October 20, 1971, the indictment was returned on December 22, 1971, and trial commenced on November 2, 1972. The prosecutor first attempted to locate the court reporter approximately three or four weeks prior to November 8, 1972—a full year after the testimony (Tr. 326). Apparently his only effort was to try to contact her through her former employer (who incidentally was the court reporter during this trial).

Upon the representation that efforts had been made to locate the court reporter and that the only testimony by Mrs. Mercurio before the grand jury was to identify documents (Tr. 325, 329)[4] the Court permitted the questioning of Mrs. Mercurio to proceed, with the direction that the government use its investigative facilities, including the FBI, to locate the court reporter and subpoena the records after the trial (Tr. 324-329).

After the trial, the government was quickly able to locate the court reporter and to obtain and file a transcript of the grand jury testimony.[5] The speed with which the prosecution ob-

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[4] At this point, the trial transcript is very interesting (Tr. 328-329):

> "Mr. Cashill: My inquiry in the grand jury, as I recall it, concerned only the laying of a foundation for the documents. I intend, in the case of Mrs. Mercurio, to go beyond the scope of the grand jury testimony, but at least insofar as——
>
> "The Court: You mean all she did was identify the documents in the grand jury room?
>
> "Mr. Cashill: That is correct. That is my recollection.
>
> "The Court: I'm confident your recollection is correct, although you must bear the burden of that, because you were there.
>
> "Mr. Cashill: I understand that."

From the transcript of the grand jury testimony of Mrs. Mercurio, quickly located and filed a week after the trial ended, it appears that Mr. Cashill was not even in the grand jury room—it shows appearances only of Mr. Strachan and Mr. Vockrodt. Furthermore, contrary to the representation to the Court, she was not just questioned as to the documents—the bulk of the examination related to types and sources of fruits and vegetables.

It is also interesting to note that later in her testimony (Tr. 370-371), it was revealed that another Mercurio employee had also identified the same documents for the government. See sub-section C hereof.

[5] The trial ended late at night on Friday, November 10, 1972. By 9:00 A.M. of the following Friday, as per date stamp on the grand jury transcript (Govt. Exh. 23), the court reporter had been located and the transcript of the grand jury testimony of Mrs. Mercurio and two other witnesses had been transcribed and notarized.

tained the transcript is significant in determining whether they had used diligent efforts to locate her prior to trial.

The grand jury testimony would have been useful to the defense for cross-examination purposes because Mrs. Mercurio testified in the grand jury that some Missouri-grown produce was sold in the summer. She did not so testify at the trial. Inasmuch as part of the period about which she testified related to fruit and vegetables being sold in May, further inquiry would have been appropriate to determine whether some of the fruit and vegetables about which she testified could have come from Missouri.

We believe that the prosecution failed to exercise due diligence to obtain the grand jury transcript of Mrs. Mercurio prior to her testimony and that, within the provisions of the Jencks Act, her testimony should not have been allowed. The failure to produce Jencks statements after a witness has completed his direct examination will lead to a striking of the testimony; certainly where the Court is aware of a Jencks Act violation prior to the testimony, a prohibition against such testimony would be an appropriate remedy consistent with the spirit of the Jencks Act.

Case law supports our position, particularly those cases in which reports or notes have been destroyed by investigating agents. In **Melton v. United States,** 398 F. 2d 321, 322 (10th Cir. 1968), the Court was "unwilling to let the prosecution take advantage of the lack of transcription. Dennis v. United States, 384 U.S. 855, 873, 86 S. Ct. 1840, says that 'it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.' "

See also **United States v. Bryant,** 439 F. 2d 642, 650-651 (D. C. Cir. 1971), where the Court said, in reliance upon **United States v. Augenblick,** 393 U.S. 348 (1969), "the burden

of explanation on the Government must be a heavy one." The prosecution must make " 'earnest efforts' to preserve crucial materials and to find them once a discovery request is made."

Here there was no showing of earnest efforts by the prosecution to preserve the grand jury testimony, for there was in fact no effort at all until a year later. Whether the effort was an earnest one with diligence seems doubtful, because all the government did apparently was to contact the missing reporter's employer; they made no effort to use the facilities of their investigating agencies to locate the reporter until after the trial. Once having been directed by the Court to do so, it took just a few days to obtain the transcript. Certainly this could have been done during the year prior to trial. Giving the prosecution every benefit, they were certainly negligent in failing to preserve the transcript. Cf. **United States v. Consolidated Laundries Corporation,** 291 F. 2d 563, 570-571 (2nd Cir. 1961).

(We are not conceding that the test to be applied is good faith vs. bad faith. As said in **Lee v. United States,** 368 F. 2d 834, 837 (D.C. Cir. 1966), "the Jencks Act does not embody in terms any 'good faith' exception." We do contend that on the facts herein, the negligence and lack of diligence of the prosecution negate any possible claim of good faith, if the claim were relevant.)

The Court of Appeals held that the failure to provide the transcript of Mrs. Mercurio's grand jury testimony was harmless error. It acknowledged that in the grand jury testimony she admitted that a portion of the produce was intrastate, but the opinion implies that the balance was interstate. The fallacy in the Court's reasoning is that, because of the unavailability of the grand jury testimony, there was no opportunity to determine by cross-examination whether in fact all of the shipments from her husband's firm might have been intrastate in origin. The

Hobbs Act is concerned with the interstate commerce portion of the business, but petitioners were not given an opportunity to develop this distinction before the jury. The trial jury was told that all of the Mercurio produce was interstate. With appropriate cross-examination based upon the grand jury transcripts, it could very well have been that all of the Mercurio produce was intrastate. Because she represented the largest supplier of the three who testified, this should not be considered harmless error.

The grand jury testimony of Mrs. Mercurio could have been obtained with minimum effort by the prosecution and the investigative agencies available to them. The discovery and Sixth Amendment rights of a defendant should not be emasculated by such casual conduct of the prosecutor. Having been forewarned, the District Court should not have permitted Mrs. Mercurio to testify, thereby making even less of a submissible case against petitioners.

Because of the conflict with decisions of other circuits and because of the importance of a determination of the discovery rights guaranteed by the Jencks Act and the Sixth Amendment, we respectfully suggest that certiorari should be granted as to this Question.

C

Mrs. Mercurio was the prosecution's chief witness in their efforts to show that the business of the Colonial Markets related to interstate commerce. She was quizzed about and identified business records of her husband's produce firm. On cross-examination, it developed that another employee, whose identity was unknown to petitioners, had apparently been interviewed by government investigating officers concerning the same documents. Petitioners' request for the report of the interview of the other employee for use in connection with cross-examination of Mrs. Mercurio was denied (Tr. 370-372).

It is true that the Jencks Act talks in terms of production of statements by the witness, but certainly the spirit of the Jencks Act is abused if one person can fully enlighten the prosecution concerning business records and then another person having the same access to the business records (and perhaps being prepared for trial on the basis of the statement by the first employee) can be used as a witness without the requirements of producing any statements. The purpose of both witnesses was to identify corporate business records. In effect, the corporation was the witness, and it would seem altogether proper that all statements of such "witness" (the corporation) be made available for use by the defense. Certainly no harm could have come to the government by the production of the statements of the fellow employee, unless contradiction of the government's case could be considered harm.

It is significant that in several places in § 3500 there are references to the "subject matter" of the testimony of the witness. The use of these words supports our position—here the subject matter was corporate business and corporate records. It would be overly technical and contrary to the spirit of the Jencks Act to permit a statement by one corporate employee to be hidden after another corporate employee testified concerning the corporate subject matter of the statement of the first employee.

We believe the Court of Appeals misconstrued **United States v. Borelli,** 336 F. 2d 376 (2nd Cir. 1964), cert. den. 379 U.S. 960 (1965). There was as much elusion of the duty to disclose statements in the instant case as there. It is immaterial that the secret witness did not testify before the grand or trial jury here—a statement was made, and the Jencks Act relates to statements.

As said in **Campbell v. United States,** 365 U.S. 85, 92 (1961):

> "The command of the statute (18 U.S.C. § 3500) is thus designed to further the fair and just administration of

criminal justice, a goal of which the judiciary is the special guardian."

Because of the conflict with the **Borelli** decision of the Second Circuit and because of the importance of this issue in the administration of justice, we respectfully suggest that certiorari should be granted as to this Question.

* * * * * * * *

The Jencks Act was a restriction on this Court's decision in **Jencks v. United States,** 353 U.S. 657 (1957). Since its passage, much litigation has developed over its interpretation and especially over prosecutors' further efforts to restrict rights of discovery. The decision below has provided three new methods by which a prosecutor may further emasculate the spirit of this Court's **Jencks** decision, for now the prosecutor may deliberately fail to record testimony, or he can be less than diligent in locating the grand jury reporter, or he can bypass the Jencks Act by using different witnesses in investigation and in trial. Unless this Court intervenes, further violations are assured.

This petition presents an opportunity for this Court to review the present status of its decision in **Jencks** and of the Jencks Act. It is respectfully submitted that certiorari should be granted.

IV

Immunization of Accardi as a Witness

Count II of the indictment named Anthony Michael Accardi as a co-conspirator and defendant. On January 7, 1972, he filed a motion for severance and an affidavit in support thereof. Accardi's motion and those of other defendants were all overruled on June 30, 1972. The cause was set for trial on October 10, 1972, and on that date was continued to Monday, October 30.

On October 25, the Wednesday before the trial was set, Accardi renewed his motion, alleging the same grounds as before and additional grounds relating basically to the fact that he was not charged in Count I and that he had no prior criminal record. No affidavit in support of this motion was filed. Within 45 minutes after the filing of Accardi's renewed motion for severance (as reflected by the District Clerk's filing stamps on the documents), the prosecution responded and joined in the motion for severance, not for any of the reasons alleged by Accardi, but for the following stated reasons:

> "The United States is now aware of statements made by defendant Accardi subsequent to the conspiracy which could inculpate certain of the other defendants which the jury may not be able to exclude from their consideration, despite a limiting instruction, thereby denying the other defendants effective cross-examination. **Bruton v. United States,** 391 U.S. 123 (1968). An adverse ruling to the government on the admissibility of these statements by Accardi could jeopardize the prosecution of defendant Accardi."[6]

On Friday morning, October 27, the District Court granted a severance to Accardi and set his separate trial for December 4.[7]

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[6] Although the response said the United States was "now aware", there was nothing to indicate when this information first came to the attention of the government. We suggest that such statements could only have been made to the grand jury or other government investigators prior to indictment.

The prosecutors' concern for the **Bruton** rights of the co-defendants was not apparent during the trial when statements of defendants Orlando and Scalise were introduced in evidence (Tr. 459-460, 488). See Question V of this petition re Orlando statement.

[7] It is interesting to note that copies of the renewed motion for severance, the government's response, and the Court's ruling were not furnished to counsel for the co-defendants. They first learned that Accardi was not to be tried with them on October 30, when the trial was scheduled to begin.

Ultimately and after petitioners were sentenced, the charges against Accardi were dismissed on December 26, 1972, on motion of the government.[8]

After the severance of Accardi, the trial commenced against the three remaining defendants. Accardi was constantly referred to by Wozniak and all other witnesses. He was obviously a person knowledgeable on the issue of whether Wozniak was a part owner of the fruit stands as alleged in the indictment or a lender of money as claimed by defendants. He was important to the issue of whether the fruit stands were involved in interstate commerce. In addition, having had disputes with Wozniak, he could have known about possible motivations for the charges brought against petitioners. He could have testified as to the circumstances of the loans from Wozniak. Without Accardi, it was impossible to contradict Wozniak's version of transactions in which just the two of them were involved or present.

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[8] The chronology from October 25, 1972 to December 26, 1972 is interesting:

1) On October 25, Accardi filed his renewed motion for severance and the government responded.

2) On October 27, the Court granted the severance, with the Accardi trial set for December 4, 1972.

3) On November 10, petitioners were convicted, and sentencing was set for December 1 (before Accardi's trial was set).

4) Petitioners' sentencing was thereafter re-scheduled for December 8.

5) On December 4, Accardi's trial was re-set for January 8, 1973.

6) On December 8, petitioners' post-trial motions were overruled and they were sentenced.

7) On December 26, charges against Accardi were dismissed.

Can there be any conclusion other than that the government did not want to try Accardi, but did not want him to be available as a witness for the other defendants, and therefore kept his case pending until after petitioners were sentenced? When defense counsel suggested that this was the government's motive (Tr. 204-205), the prosecutor made no denial!

At the conclusion of the prosecution's case, it was obvious that Accardi was an essential witness, and defense counsel made an effort to secure his attendance. His attorney, however, would not permit him to testify and wrote a letter to defense counsel (Deft. Exh. F):

> "In response to the question posed by you and the other defense attorneys in the Biondo, et al. case presently being tried in the Federal Court as to the availability of my client, Anthony M. Accardi to testify for the defense, I must tell you that I cannot allow him to testify.
>
> "As I am sure you are aware, Mr. Accardi remains a defendant in that lawsuit, and as such I must advise him to rely upon his rights under the Fifth Amendment, should he be called as a witness by you or the other defense attorneys. I feel Mr. Accardi has no other alternative, considering he is a named defendant in this suit, with the charge against him still pending."

Thus, because of the pendency of the charges against Accardi, it was impossible for petitioners to secure his attendance as a witness in their behalf. Petitioners were deprived of their right to due process of law under the Fifth Amendment and of their Sixth Amendment right to compulsory process for witnesses.

In this respect, the case is analogous to **Washington v. Texas,** 388 U.S. 14 (1967), where a co-defendant was immunized from testifying in behalf of the defendant by virtue of a Texas statute. This Court ruled the statute violative of the Sixth Amendment. (Without a statute the prosecution in this instance achieved the same result, for they effectively immunized Accardi from being available to defendants as a witness.) This Court in **Washington** concluded (388 U.S. at 23):

> "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right

> to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed."

See also **United States v. Mendez-Rodriguez,** 450 F. 2d 1 (9th Cir. 1971), in which the government's deportation of certain witnesses made them unavailable to the defense. The Court ruled that the action of the government deprived defendant of his Fifth Amendment due process rights and his Sixth Amendment rights to process for witnesses.

Similarly, in the instant case the action of the government in making Accardi unavailable to petitioners deprived them of their rights to due process and to process for witnesses.

In overruling petitioners' assertion of error in the prosecution's immunization of Accardi as a potential defense witness, the Court of Appeals stated that there was "nothing in the record to show whether Accardi would have taken his attorney's advice and declined to testify or if he would have testified, what his testimony would be." This was not an issue in the trial court (Tr. 554-555). Had there been any question as to whether Accardi would follow his attorney's advice or as to the relevancy of his testimony, a record could have been made as to those matters.

There was no doubt in anyone's mind that Accardi would not testify when his attorney said: ". . . I must tell you that I **cannot** allow him to testify." (Emphasis added.) Neither the trial Court nor the prosecutor disputed the fact that Accardi would refuse to testify or that his testimony would be relevant. (See also earlier discussion re Accardi at Tr. 203-206). Cer-

tainly petitioners could have subpoenaed him so that he could have refused in front of the jury to testify, and certainly petitioners could have made an offer of proof as to his testimony. But such an exercise in futility was not deemed necessary by the trial Court or the prosecutor during trial. Nor was it urged by the government in their brief in the Court of Appeals.

Petitioners were deprived of their Constitutional right to call an essential witness in their behalf. In sanctioning the government's immunization of him as a witness, the Court of Appeals has failed to follow this Court's decision in **Washington v. Texas,** supra, and is in conflict with the decision of the Ninth Circuit in **United States v. Mendez-Rodriguez,** supra.

Because of these conflicts, we respectfully suggest that certiorari should be granted as to this Question.

V

Orlando Statement (Miranda)

At an initial hearing outside the presence of the jury, FBI Agent Jones testified that Orlando was conveyed to FBI headquarters after his arrest. He was advised of his Miranda rights in the FBI car and again in the FBI office (Tr. 465-466, 471-472).

After giving the warning, Agent Jones presented a waiver of rights form to Orlando for his signature and, according to Agent Jones, Orlando "looked at the form, said he understood his rights, he declined to sign the form" (Govt. Exh. 16, Tr. 465). Orlando examined the waiver form for 20 to 30 seconds or a minute (Tr. 474). Agent Jones then testified with reference to Exhibit 16 (Tr. 475):

"Q. Did you ask him to sign it? A. Yes.

Q. Did he say that he wouldn't sign it or just did not sign it? A. He said he wouldn't sign it.

Q. Did you then continue to question him? A. Yes.

Q. Did you ask him if he would consent to questioning?

A. He made no effort to stop the questioning."

Agent Jones further acknowledged that it was his practice, after a person declined to sign a waiver form, to still proceed to question him (Tr. 482).

The District Court permitted the agent to testify as to the interview and that Orlando "said he didn't know anything about any extortion, didn't know anything about any $5,000.00, said he had just been looking for a job that day, and denied that he had been in the Normandy Shopping Center earlier that same day" (Tr. 491). Jones testified that he had in fact seen Orlando at about noon-time at the shopping center (Tr. 491-492). Biondo was not present when Orlando was interviewed (Tr. 482).

In closing argument, the prosecutor commented upon the statements made by Orlando to Jones and asked "Now, why would an innocent man, a man who had nothing to hide, make such a statement as that? I suggest to you that Willie Orlando had everything to hide, that he was an integral, important part in this scheme to extort the money from Joseph Wozniak" (Tr. 593).

The District Court instructed the jury as follows (Tr. 668-669):

"Conduct of a defendant, including statements knowingly made and acts knowingly done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury in

the light of all other evidence in the case, in determining guilt or innocence.

"When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt of that defendant, and that defendant alone. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

"Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of his guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury, but may not be considered as evidence against any other defendant in the case."

The last clause of the paragraph, which is not in the pattern instruction (§ 11.20) of Devitt and Blackmar, **Federal Jury Practice and Instructions,** is the sort of instruction condemned in **Bruton v. United States,** 391 U. S. 123 (1968).

Admitting the evidence of Orlando's statement was error. When Orlando told Jones that he would sign the waiver form, he was telling him that he did not want to be interviewed. On the basis of **Miranda v. Arizona,** 384 U. S. 436 (1966), the questioning by Jones should have been discontinued immediately.

Although the statements attributed to Orlando were not necessarily incriminatory but were exculpatory in nature, there is no doubt that **Miranda** is applicable. (*Id.*, at 444 and 476-477.)

Much of the language of **Miranda** is applicable here. By refusing to sign the waiver form and with counsel absent, Orlando was entitled to have the interrogation discontinued im-

mediately; he had indicated that he wished to remain silent. (*Id.*, at 445 and 473-474.) Under these circumstances, a heavy burden rests on the government to demonstrate that Orlando knowingly and intelligently waived his privilege against self-incrimination. (*Id.*, at 475). Waiver will not be presumed from silence or from the fact that a statement is obtained. (*Id.*, at 475.)

Here the prosecution did not maintain its heavy burden of proving that Orlando knowingly, intelligently and voluntarily waived his Fifth Amendment rights. All it proved was that Orlando said he did not want to waive his rights; then the agent, in accordance with his standard practice, persisted in the questioning. Note that with reference to Scalise, Agent Jones testified that after advice of his rights, Scalise consented to the interview (Tr. 467, 478-479); there was no comparable testimony as to Orlando (Tr. 465).

A number of cases have considered this issue, but the Circuits are not in agreement as to how **Miranda** is to be applied. The opinion of the Eighth Circuit is in conflict with such decisions as **United States v. Nielsen,** 392 F. 2d 849 (7th Cir. 1968); **United States v. Priest,** 409 F. 2d 491 (5th Cir. 1969); **United States v. Jenkins,** 440 F. 2d 574 (7th Cir. 1971); **United States v. Phelps,** 443 F. 2d 246 (5th Cir. 1971), and **United States v. Blair,** 470 F. 2d 331 (5th Cir. 1972). See also **United States v. Ramos,** 448 F. 2d 398, 399 (5th Cir. 1971), where the Court in reversing a conviction stated:

> "In the instant case the record clearly reveals that neither of the defendants voluntarily initiated further conversation subsequent to their refusals to sign a waiver form. Rather, the government agent himself initiated further questioning without any instigation by either defendant. Therefore, under our decision in **Phelps,** we hold that the agents' refusal in this case to terminate each interview

violated the Supreme Court's mandate in **Miranda** and that the defendants' incriminating statements were thereby rendered inadmissible."

Based upon **Miranda** and other decisions interpreting **Miranda,** it is clear that as soon as petitioner Orlando refused to sign the waiver form, he had indicated that he did not want to be questioned, and Agent Jones should have discontinued further interrogation. The statements allegedly made to Jones should not have been admitted into evidence because they were obtained in violation of his rights against self-incrimination guaranteed by the Fifth Amendment. Orlando's conviction should be reversed.

This error and that relating to Scalise's statements were so prejudicial that they also affected petitioner Biondo. The matters about which Orlando was questioned and which he denied (the extortion, the payment of $5,000.00, his presence at the shopping center lot) were so closely tied to his joint activities with Biondo, as detailed by Wozniak and the agents, that they poisoned the case against Biondo as well. But whether or not the statements were admissible as to Orlando, they were made subsequent to the termination of the alleged conspiracy, and their admission into evidence was prejudicial to Biondo, under the doctrine of **Bruton v. United States,** 391 U.S. 123 (1968).[9]

Because of the failure of the Court of Appeals to follow the doctrine of **Miranda v. Arizona,** 384 U.S. 436 (1966), and because of the conflict which exists among the Circuits as to the application of **Miranda,** we respectfully suggest that certiorari should be granted as to this Question.

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[9] The admission of the evidence as to the Scalise interview also violated Orlando's rights under **Bruton**.

VI

Improper Comment on Failure to Testify

None of the defendants testified. The prosecutor, however, made sure the jury was aware that the defense had not produced any evidence to contradict government witnesses. In the final portion of the prosecutors' closing argument, after defense counsel had already completed their argument, prosecutor Vockrodt began to discuss the FBI interview of defendant Scalise four days after the arrests of Biondo and Orlando. Mr. Vockrodt argued (Tr. 642-643):

> "Now, let's go to May 25th, which is four days after Orlando and Biondo were arrested. The FBI has an interview with Joe Boy Scalise. Now, Joe Boy was very quick to say that he left the conversation with Willie Orlando and Joe Wozniak on May 18th and went shopping. This is four days after they were arrested for extortion. Very quick to inject that. Now, unless he were involved in the extortionate scheme why would he try to disassociate himself with a conversation that occurred on May 18th?
>
> Now, it's up to you folks to determine whether Mr. Wozniak, his testimony from that witness stand, is the truth. He's the only participant in that May 18th meeting that's testified here. Now, you wonder why——"

At this point, defense counsel interrupted and, at the bench, moved for a mistrial because of the improper comment on the failure to testify (Tr. 643). After some confusing statements by the prosecutor and after having the statement read twice by the court reporter, the District Court was obviously troubled by the argument. The prosecutor's feeble effort to explain what he was going to say was: "I wonder why Scalise wasn't seen by Wozniak at the May 18th, 1971 meeting?" (Tr. 643-644).[10]

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[10] Scalise was in fact at the May 18th meeting, and Wozniak so testified (Tr. 65-73, 253, 268-271).

We submit that the prosecutor had no intention of finishing his sentence as he stated. It is obvious that what he suggested he intended to say had no logical basis to follow what had already been said prior to the objection.

That the District Court was deeply concerned as to the impropriety of the argument and was also not persuaded by the prosecutor's explanation of what he intended to say is obvious from the fact that the Court took the unusual action of declaring a thirty minute recess in the midst of the closing argument to allow the prosecutor to produce some authorities that a mistrial should not be declared (Tr. 644-645). After the recess (which actually was in excess of an hour), the Court overruled the mistrial motion (Tr. 646).

This incident was obviously a comment on the failure of defendants to testify. Otherwise, why would a prosecutor say; "He's (Wozniak is) the only participant in that May 18th meeting that's testified here." According to the testimony of Wozniak, two others (Orlando and Scalise) were at that meeting. The clear intent of the prosecutor's remark was that because Wozniak testified and defendants did not, Wozniak's testimony must be believed. This necessarily called to the jury's attention the failure of defendants to take the witness stand and violated their Fifth Amendment right against self-incrimination. It applied to all defendants, because Wozniak testified to a great deal of private conversation and contact with petitioners Biondo and Orlando; he was the only one who testified.

This Court has declared that comment on the failure of a defendant to testify is clearly reversible error, whether in a federal or state trial. **Griffin v. California,** 380 U.S. 609 (1965). Other circuits have ruled similarly. See **White v. United States,** 248 A. 2d 826 (C.A. D.C. 1969), **Rodriguez-Sandoval v. United States,** 409 F. 2d 529 (1st Cir. 1969), **United States v. Nolan,** 416 F. 2d 588, 594 (10th Cir. 1969), cert. den. 396 U.S. 912

(1969), and **United States v. Handman,** 447 F. 2d 853 (7th Cir. 1971).

The opinion below seems to recognize that the comment was error but characterizes it as harmless error. We suggest that in the context of the way in which it was made, coupled with the hour-long delay in the resumption of the prosecutor's agreement, the jury could not help but have gotten the message of the prosecutor. A cautionary instruction to the jury was meaningless. Cf. **Bruton v. United States,** 391 U.S. 123 (1968).

Because of the failure to follow the opinion of this Court in **Griffin v. California,** supra, and the conflict with decisions of other Circuits, we respectfully suggest that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

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